Supreme Court, U.S.
FILED

(1)

No. 99 193 JUL 28 1999

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BARBARA PARRISH, DENNIS WETZEL
and ROBERT LUCAS,

Petitioners,

v.

GARY NIKOLITS, in his official capacity as the
Property Appraiser of Palm Beach County, Florida,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FREDERICK W. FORD
Counsel of Record
900 East Indiantown Road
Suite 216
Jupiter, Florida 33477
(561) 745-1998

HARRIET RAE FREEMAN
105 Narcissus Avenue
Suite 412
West Palm Beach, FL 33401
(561) 659-4331

BARBARA SCHEFFER
11380 Prosperity Farms
Road
Suite 204
Palm Beach Gdns, FL 33410
(561) 622-8100

Attorneys for Petitioners

154113

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

44PP

QUESTION PRESENTED

Does the First Amendment permit newly elected public officials to terminate non-policy-making , non-confidential public employees in order to "make room" for the officials' political and financial supporters so long as the officials intend only to act out of favoritism for their supporters and not out of discriminatory animus toward the incumbent government employees being displaced?

PARTIES TO THE PROCEEDINGS

1. Barbara Parrish, Petitioner herein, Appellant/Plaintiff below;

2. Robert Lucas, Petitioner herein, Appellant/Plaintiff below;

3. Dennis Wetzel, Petitioner herein, Appellant/Plaintiff below;

4. Gary Nikolits, in his official capacity as the Property Appraiser of Palm Beach County, Respondent herein, Appellee/Defendant below.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provision at Issue	2
Statement of the Case	3
A. Facts Relevant to Granting the Writ	3
B. Procedural Background	5
Reasons for Granting the Writ	7
There Is A Conflict In The Circuits About Whether Or Not Partisan Elected Officials Can Dismiss Incumbent Government Employees For The Purpose Of "Making Room" For The Officials' Political Supporters So Long As They Do Not Act With Any Discriminatory Animus Against The Dismissed Government Employees	7
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Acosta-Orozco v. Rodriguez-de-Rivera, 132 F.3d 97 (1st Cir. 1997) 11, 12

Barton v. Manchin, 688 F. Supp. 139 (S.D. W. Va. 1988) 11

Bennis v. Gable, 823 F.2d 723 (3d Cir. 1987) 11, 12

Berry v. Bailey, 726 F.2d 6670 (11th Cir. 1984) .. 8

Branti v. Finkel, 445 U.S. 507 (1980) 8, 14, 15

Brown v. American Honda Motor Co., 939 F.2d 946 (11th Cir. 1991) 8

Conjour v. Whitehall Township, 850 F. Supp. 309 (E.D. Pa. 1994) 11

DeLaCruz v. Pruitt, 590 F. Supp. 1296 (N.D. Ind. 1984) 11

EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594 (1st Cir. 1995) 9

Elrod v. Burns, 427 U.S. 347 (1976) 8, 14, 15

Griggs-Ryan v. Smith, 904 F.2d 112 (1st Cir. 1990) 9

Cited Authoriti

	Page
Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982)	8
Lee v. Russell Co. Bd of Education, 684 F.2d 769 (11th Cir. 1982)	8
Mason v. Oklahoma Turnpike Authority, 115 F.3d 1442 (10th Cir. 1997)	11, 13
McCabe v. Sharrett, 12 F.3d 1558 (11th Cir. 1994)	8
Mingus Constructors, Inc. v. United States, 1812 F.2d 1387 (Fed. Cir. 1987)	9
Nicholson v. Gant, 816 F.2d 591 (11th Cir. 1987)	8
Picha v. City of Parma, 1992 WL 57419, 1992 U.S. App. LEXIS 6291 (6th Cir. Mar. 25, 1992)	11, 13
Ray v. Leeds, 837 F.2d 1542 (11th Cir. 1988)	8
Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)	8, 15
Schwabenbauer v. Board of Educ., 667 F.2d 305 (2d Cir. 1981)	9
Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992)	8

Cited Authorities

Page

Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981) 6, 8, 9, 10

Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) 8

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343(3)-(4) 2

42 U.S.C. § 1983 ..... 2, 5

United States Constitution:

United States Constitution Amendment 1 ..... *passim*

Rule:

Fed. R. Civ. P. 56 9

Other Authority:

WEBSTER'S COLLEGE DICTIONARY 991 (1991) 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed January 27, 1999 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Florida Granting Defendant's Motion For Summary Judgment Dated And Filed December 31, 1997 ..... 3a

Appendix C — Final Summary Judgment Of The United States District Court For The Southern District Of Florida Dated And Filed December 31, 1997 ..... 17a

Appendix D — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed April 29, 1999 ..... 19a

Petitioners, Barbara Parrish, Robert Lucas, and Dennis Wetzel, respectfully request that a Writ of Certiorari be issued to review the United States Court of Appeals for the Eleventh Circuit's per curiam affirmance of the Final Summary Judgment of the United States District Court for the Southern District of Florida in this case.

OPINIONS BELOW

An original decision of the United States District Court for the Southern District of Florida granting Summary Judgment to Respondent in both his official and individual capacity in 1994 is not reported. This decision is not reprinted in the Appendix of this Petition because it is not necessary to ascertain the grounds of the Judgment on which review is now sought. The opinion of the Eleventh Circuit, vacating this grant of Summary Judgment in favor of Respondent in his official capacity and affirming in his individual capacity is reported as *Parrish v. Nikolits*, 86 F.3d 1088 (11th Cir. 1996), *pet. for reh'g and reh'g en banc denied, cert. denied*, 520 U.S. 128, 117 S. Ct. 1818, 137 L. Ed. 2d 1027 (1997) (hereafter, *Parrish I*). This opinion is not reprinted in the Appendix of this Petition because it is not necessary to ascertain the grounds of the Judgment on which review is now sought.

After remand, the United States District Court for the Southern District of Florida issued an Order Granting Defendant's Second Motion for Summary Judgment and a Final Summary Judgment in favor of Respondent and denied all pending motions as moot. This Order is reprinted in the Appendix to this Petition at Appendix "B," and the Final Summary Judgment is reprinted at Appendix "C." The opinion of the Eleventh Circuit affirming per curiam without

opinion the United States District Court decision is reported as *Parrish v. Nikolits*, 170 F.3d 188 (11th Cir. 1999), *pet. for reh'g and reh'g en banc denied*, (11th Cir. April 29, 1999) (hereafter, *Parrish II*). This PCA and rehearing opinion are reprinted in this Petition at Appendix "A" and "D" respectively.

STATEMENT OF JURISDICTION

Original jurisdiction in the United States District Court was based on 28 U.S.C. §§ 1331, 1343(3)-(4) and 42 U.S.C. § 1983. In *Parrish II*, Final Summary Judgment was entered on December 31, 1997. *Parrish II* Petitioners prosecuted a timely appeal to the Eleventh Circuit pursuant to 28 U.S.C. § 1291. The Eleventh Circuit issued a Per Curiam Affirmance on January 27, 1999. Petitioners timely filed a Petition for Rehearing en Banc, which the Eleventh Circuit treats also as a Petition for Rehearing. The Petition was denied on April 29, 1999. Petitioners now file this timely Petition for a Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

United States Constitution Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Facts Relevant to Granting the Writ

The Palm Beach County Property Appraiser's office employed all three Petitioners for *many* years, and through at least two different political administrations. In November of 1992, Petitioner Parrish was the Director of Human Resources, Petitioner Wetzel was the Director of Information Technology, and Petitioner Lucas was the Manager of the Commercial Property Analysis Section. Their public employment with the Palm Beach County Property Appraiser's office ended suddenly when Respondent Nikolits won the general election for the Property Appraiser on November 2, 1992.

On December 9, 1992, Respondent, prior to assuming office and thus without legal authority, sent a letter to Petitioners and five other employees who did not support his election, advising them that effective January 5, 1993, when he assumed office, their services would be terminated. On December 17, 1992, he submitted to the Human Resources Specialist the employment applications of eight individuals who had worked in or supported politically and financially his campaign. He directed that the processing of these individuals be confined to scheduling them for pre-employment physicals without full background and reference investigation.

On January 5, 1993, Respondent was officially sworn in, assumed the office of Property Appraiser, and terminated Petitioners. Respondent testified that he was "under the assumption that as an elected official that I have the right to put together the management team that I believe that I can have trust in, confidence in and will carry out my philosophy and my policies as was mandated by the voters."

The number of employee positions in the Property Appraiser's office is established in its annual Budget approved by the State Department of Revenue (DOR) and Palm Beach County Board of County Commissioners. After approval occurs, no new positions can be created without further DOR and County Commission approval. Under this system, each budgeted position is assigned a number which follows that position regardless of any re-naming or re-titling of the position.

In order to hire a new employee, a vacant position must exist in the budget with adequate funding for the new employee's salary. No vacant management position slots existed when Respondent won the election. Respondent could have gone back to the DOR and County Commission for approval to change the personnel budget allocation, but he did not do so. Instead, he removed eight people from existing management slots to fund the salaries of his eight hirees. Comparison of position numbers and salaries of the eight terminated employees with the position numbers and salaries of their replacements shows that Respondent terminated Petitioners and five other employees in management slots in order to make room to hire his political and financial supporters and friends. Prior to assuming office, Respondent instructed the Comptroller in the Property Appraisers Office to make these administrative changes.

Respondent's hirees were distinguished only by their political and financial support of, or obvious association, by family or political allegiance, with Respondent or other highly-placed Republican political officials in the county. All but one of Respondent's hirees were also financial contributors to his campaign.

B. Procedural Background

On June 17, 1993, Petitioners/Plaintiffs below filed this 42 U.S.C. § 1983 action, claiming First Amendment violations based on their patronage dismissals from their respective positions with the Palm Beach County Property Appraiser's office. Their Complaint has three counts, one count for each Petitioner. Each count sets forth facts under two independent legal claims: (1) that Respondent/Defendant below terminated Petitioners due to their political support of Respondent's opposition and/or non-support of Respondent in the elections; and (2) that in order to "make room" to hire his political and financial supporters and friends, Respondent *had* to terminate Petitioners.

Respondent answered on September 16, 1993. On December 28, 1994, the District Court granted Summary Judgment for Respondent in his official and individual capacities based on qualified immunity. Petitioners filed a Motion for Reconsideration and for Rehearing. On May 17, 1995, after full briefing, the District Court granted Petitioners' Motion but again entered Final Summary Judgment for Respondent in his official and individual capacities. Petitioners timely appealed this Judgment.

On July 3, 1996, the United States Court of Appeals for the Eleventh Circuit affirmed in part (in favor of Respondent in his individual capacity) and vacated in part (in favor of Respondent in his official capacity) and remanded the case. *Parrish v. Nikolits*, 86 F.3d 1088 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1818 (1997) (*Parrish I*) (*noting* the District Court's failure to demonstrate that political affiliation was an appropriate requirement for Petitioners' positions in the Property Appraiser's office, involving computers, appraisal standards, and personnel matters).

Respondent filed a Petition for Rehearing and Suggestion of Rehearing *en banc*, and Petitioners opposed; the Eleventh Circuit denied this Petition, and issued its Mandate on September 26, 1996. Respondent filed with this Court a Petition for a Writ of Certiorari, and Petitioners opposed. On May 17, 1997, this Court denied Respondent's Petition for a Writ, 117 S. Ct. 1818. On June 10, 1997, the District Court set the case for jury trial in late 1997 and discovery resumed.

On September 29, 1997, Respondent filed his *Second* Motion for Summary Final Judgment. On October 30, 1997, Petitioners filed their Opposition to Respondent's Motion. *Simultaneously therewith*, Petitioners filed their own Motion for Partial Summary Judgment on the Issue of Defendant's Liability (based on their "make room" claim). On October 30, 1997, Petitioners also filed a Motion to Consolidate Oral Argument on their Motion for Partial Summary Judgment with Respondent's Second Motion for Summary Final Judgment, Respondent opposed, and the District Court denied the consolidation. On November 13, 1997, the District Court heard oral argument on Respondent's Motion, and took it under advisement.

On December 31, 1997, the District Court, without providing Respondents a hearing on their Cross Motion for Partial Summary Judgment, entered its Order Granting Respondent's Motion for Summary Final Judgment and a separate Final Summary Judgment. Relying on *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981), the District Court determined that no constitutional violation occurred, that Petitioners failed to produce sufficient evidence that would support a discriminatory state of mind finding, and that Respondent

had articulated "valid, believable, non-political" reasons for terminating Petitioners, those being: Respondent had lost trust and confidence in Petitioners Parrish and Lucas, and Petitioner Wetzel's position had become non-essential. The Final Summary Judgment denied Petitioners' Motion for Partial Summary Judgment as moot without findings of fact or conclusions of law on Petitioners' Motion. Petitioners timely appealed to the Eleventh Circuit this Order and Judgment.

On January 13, 1999, Eleventh Circuit heard oral argument. On January 27, 1999, the Clerk filed the Panel's decision — "per curiam affirmed, 11th Cir. R. 36-1." (Appendix "A"). Petitioners then filed a Petition for Rehearing en Banc which the Eleventh Circuit also treats as a Petition for Rehearing. On April 29, 1999, the Eleventh Circuit denied this Petition for Rehearing (Appendix "D"). Petitioners now timely file this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THERE IS A CONFLICT IN THE CIRCUITS ABOUT WHETHER OR NOT PARTISAN ELECTED OFFICIALS CAN DISMISS INCUMBENT GOVERNMENT EMPLOYEES FOR THE PURPOSE OF "MAKING ROOM" FOR THE OFFICIALS' POLITICAL SUPPORTERS SO LONG AS THEY DO NOT ACT WITH ANY DISCRIMINATORY ANIMUS AGAINST THE DISMISSED GOVERNMENT EMPLOYEES

This Court should grant the Petition for a Writ of Certiorari in order to establish uniformity among the Circuits in the analysis of First Amendment claims based on a "make room" theory of political patronage dismissals.

There is a conflict in the circuits over whether or not a partisan elected official can evade the rules of *Elrod* and *Branti*, and their progeny,[1] by the device of dismissing government employees for the purpose of "making room" for supporters so long as they do not act with any discriminatory animus against the dismissed government employees. This case is a classic application of this device. The Eleventh Circuit, relying upon the former Fifth Circuit opinion in *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981), held in this case that political patronage plaintiffs in a "make room" case must prove that the defendant had a "discriminatory intent" to violate their First Amendment rights. [2] Petitioners squarely

---

1. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

2. The evidence is insufficient to support an inference that McCall was motivated by an intent to discriminate against plaintiffs because of their support for Bliss or by a desire to make room for McCall's own political supporters. Part of the plaintiffs' burden is proving that the defendant's intent to discriminate or violate the plaintiffs' constitutional rights was a substantial motivating factor in the employment decision.

625 F.2d at 1192. The Eleventh Circuit has relied on *Tanner* in numerous other decisions. *See McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994); *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992); *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989); *Ray v. Leeds*, 837 F.2d 1542 (11th Cir. 1988); *Nicholson v. Gant*, 816 F.2d 591 (11th Cir. 1987); *Berry v. Bailey*, 726 F.2d 6670 (11th Cir. 1984); *Lee v. Russell Co. Bd of Education*, 684 F.2d 769 (11th Cir. 1982) and *Harris v. Conradi*, 675 F.2d 1212 (11th Cir. 1982).

presented a "make room" claim and filed their own cross-summary judgment motion on that issue.[3] The District Court thought it was irrelevant because in its view it did not find evidence of any discriminatory animus toward Petitioners, only favoritism for Respondent's supporters.

On appeal Petitioners plainly explained to the Court of Appeals that Petitioners were alleging a "make room"

---

3. The District Court, in contravention of required practice under Fed. R. Civ. P. 56, failed to separately review the Parties' Cross Summary Judgment Motions which were each based on distinct and independent claims. The District Court reviewed Defendant's Motion for Summary Final Judgment (based on Petitioners' claim of retaliation for non-support in the election) but failed to give Petitioners' Motion for Partial Summary Judgment (based on the "make room" claim) any specific review whatsoever, simply finding it "moot" after granting Respondent's motion. The two summary judgment motions contained different and distinct claims, neither of which was dependent on the other. The District Court thus failed to consider whether Petitioners produced sufficient probative evidence under their "make room" claim. It failed to consider whether a genuine issue of material fact existed as to the "make room" claim. It further failed to consider Respondent's defenses and inferences to be drawn in light of the "make room" claim. And, finally, it failed to make specific findings of fact and conclusions of law on the "make room" claim, simply applying *Tanner*'s blanket "discriminatory intent" requirement to both claims. Rule 56 requires that district courts "must consider each motion separately, drawing inferences against each movant in turn, and the court of appeals must engage in de novo review." *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 n.8 (1st Cir. 1995); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990); *Mingus Constructors, Inc. v. United States*, 1812 F.2d 1387, 1391 (Fed. Cir. 1987); *Schwabenbauer v. Board of Educ.*, 667 F.2d 305, 313-14 (2d Cir. 1981).

claim.[4] Respondent countered that Petitioners could not establish a "make room" claim without proving an "intent to discriminate or violate the plaintiff's constitutional rights."[5] The Eleventh Circuit, squarely presented with this issue, summarily affirmed, per curiam and without written opinion, the District Court's decision that in a "make room" claim Petitioners must prove the public official's discriminatory intent to violate their First Amendment rights.[6]

---

4. Statement of Issues. I. Whether a District Court commits reversible error by granting Final Summary Judgment for a public official defendant on the grounds that the defendant official did not terminate non-civil service employee plaintiffs "for political patronage reasons" where plaintiffs produced undisputed evidence that, due to budgetary constraints, defendant official *had* to terminate plaintiffs in order to "make room" to hire his political and financial supporters.

Brief for Appellant, in Eleventh Circuit, at 1.

5. Plaintiff's reliance on "make room" cases from other jurisdictions is also of no avail for several reasons. First *Tanner* is the leading and binding authority within this jurisdiction in cases such as the one at bar. *Tanner* mandates that Plaintiff's establish the "defendant's **intent** to discriminate or [to] violate the plaintiff's constitutional rights was a substantial motivating factor in the employment decision." 635 F.2d at 1192 (emphasis added). Because Plaintiffs failed to satisfy the Tanner test, the cases from other jurisdictions are to no avail.

Brief for Appellee, in 11th Circuit, at 40-41.

6. These factors compel this court to issue summary judgment for defendant in this action. Plainly, under the reasoning of *Tanner*, the evidence in this case is

(Cont'd)

The Eleventh Circuit's adoption of a "discriminatory intent" requirement in a "make room" claim conflicts with decisions in the First,[7] Third,[8] Sixth,[9] and Tenth[10] Circuits, as well as District Court decisions in the Third, Fourth and Seventh Circuits: [11]

(Cont'd)

> insufficient to create a question of material fact which would warrant presentation of plaintiff's political patronage allegations to a jury. Plaintiff claims that it would be inappropriate for this court to make final "state of mind" findings as to Defendant's intent in terminating the plaintiffs, arguing that such findings must be left to a jury. However, *Tanner* makes clear that plaintiffs must produce sufficient evidence that would support a discriminatory state of mind finding. Plaintiffs have failed to make this showing.

Parrish v. Nikolits, case below (S.D. Fla. 1998), *aff'd*, 170 F.3d 188 (11th Cir. 1999) (Appendix "B" at p. 16a).

7. *Acosta-Orozco v. Rodriguez-de-Rivera*, 132 F.3d 97, 103 n.6 (1st Cir. 1997).

8. *Bennis v. Gable*, 823 F.2d 723, 731-32 (3d Cir. 1987)

9. *Picha v. City of Parma*, 1992 WL 57419, *5 n.2, 1992 U.S. App. LEXIS 6291, *14 n.2 (6th Cir. Mar. 25, 1992).

10. *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442, 1451 n.5 (10th Cir. 1997).

11. *See Conjour v. Whitehall Township*, 850 F. Supp. 309, 317 (E.D. Pa. 1994); *DeLaCruz v. Pruitt*, 590 F. Supp. 1296, 1303 (N.D. Ind. 1984); *Barton v. Manchin*, 688 F. Supp. 139 (S.D. W. Va. 1988).

1st Circuit.

Acosta-Orozco v. Rodriguez-de-Rivera, 132 F.3d 97, 103 n.6 (1st Cir. 1997):

> [P]olitical diversity among the Managerial Coordinators would not doom plaintiffs' claim. Defendants cannot prevail simply by showing that a desire to reward their political supporters, rather than a desire to punish their political opponents, underlay their decision. Either motive may produce unlawful results. The First Amendment condemns "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job.". . . . That coercion is equally unlawful when it is directed toward apolitical career employees as when it is directed towards a party's political opponents. . . . That a party chooses to reward its followers with good jobs inevitably affects those who are not followers and who see their upward mobility in the agency thwarted in very concrete ways (citations omitted).

3rd Circuit.

Bennis v. Gable, 823 F.2d 723, 731, 732 (3rd Circuit 1987):

> The defendants also assert that Elrod and Branti should not be extended to cover plaintiffs who were not demoted for political opposition; but rather, were demoted simply to make room for political supporters. The problem with this

> assertion, however, is that an alternative view of a demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one.
>
> * * *
>
> [W]e conclude that the district court properly charged that the defendants could be found liable if they demoted the plaintiffs to fill positions for [the elected official's] political supporters.

6th Circuit.

Picha v. City of Parma, 1992 WL 57419, *5 n.2, 1992 U.S. App. LEXIS 6291, *14 n.2 (6th Cir. Mar. 25, 1992):

> Even if [plaintiff] was not removed because of his political activities, he would have a cause of action if he were removed in order to make room for the political allies of the mayor."

10th Circuit.

Mason v. Oklahoma Turnpike Authority, 115 F.3d 1442, 1451 n.5 (10th Cir. 1997):

> The Supreme Court has explained that in establishing a constitutional violation the plaintiff need not prove that the discharge was punitive or that the employer actually tried to coerce the plaintiff to alter his political views. Instead, it is

> enough to show that the plaintiff was discharged to make room for a person with political sponsorship the plaintiff lacked. *Rutan*, 497 U.S. at 71. This rule protects against "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." *Id.* (*quoting Branti*, 445 U.S. at 516).

None of these cases required the public official to have a discriminatory intent against the public employee being removed. The public official violates the First Amendment simply by terminating or even demoting public employees in order to make room for his political and financial supporters.[12]

The Eleventh Circuit's decision also contravenes this Court's mandates in *Elrod* and *Branti*. "The practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments," *Elrod*, 427 U.S. at 373, unless "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Patronage is "the power of public officials to make appointments to government jobs or grant other favors to their supporters[;] the distribution of such jobs or favors[; and] the jobs or favors so distributed." WEBSTER'S COLLEGE DICTIONARY 991 (1991).

---

12. Alternatively, it could be argued that the fact that the public official wanted to place his political supporters in government jobs when no positions were available is sufficient to raise an inference that the official had the discriminatory intent to remove current employees in order to effectuate his desires, adequate to survive a motion for summary judgment.

In *Branti*, the United States Supreme Court found "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti*, 445 U.S. at 517. Justice Brennan, in his plurality opinion in *Elrod*, explained that patronage dismissals are but one form of patronage practice. **"The practice also includes placing loyal supporters in government jobs that may or may not have been made available by political discharges."** *Elrod*, 427 U.S. at 353 (emphasis added).

The instant case is typical of most "make room" claims. It clearly demonstrates why discriminatory intent against the terminated employee has not been held to be a requirement of a "make room" claim. Due to budgetary constraints, Respondent Nikolits could not hire his political and financial supporters without vacant position slots with adequate funding to pay their salaries. So, he terminated those persons in the position slots he needed.[13] He may not have targeted any particular employee for termination, he may not have intended to discriminate against any particular employee, but it is clear that he intended to, and did, make room for his political and financial supporters and friends. This is the essence of raw political patronage.

To require, as the Eleventh Circuit did here, that a government employee terminated in order to make room for a newly elected official's political supporters must prove "discriminatory intent" effectively guts this Court's mandate in *Elrod*, *Branti*, and *Rutan*, that public employees be free from

---

13. It had been previously determined by the Eleventh Circuit that Petitioners here were not policy-making, confidential employees for whom "party affiliation [was] an appropriate requirement for the effective performance of their positions." *Parrish v. Nikolits*, 86 F.3d 1088 (11th Cir. 1996) (*Parrish I*).

patronage dismissal for no other reason than for being in the wrong position slot at the wrong time. The divergence of the Eleventh Circuit from the mandate of this Court and at least four other United States Courts of Appeals requires this Court's intervention through the grant of this Writ to the Eleventh Circuit in order to achieve uniformity among the Circuits.

CONCLUSION

Based on the foregoing reasons, Petitioners, Barbara Parrish, Robert Lucas, and Dennis Wetzel, respectfully request that the Supreme Court of the United States grant this Petition for a Writ of Certiorari.

Respectfully submitted,

FREDERICK W. FORD
Counsel of Record
900 East Indiantown Road
Suite 216
Jupiter, Florida 33477
(561) 745-1998

HARRIET RAE FREEMAN
105 Narcissus Avenue
Suite 412
West Palm Beach, FL 33401
(561) 659-4331

BARBARA SCHEFFER
11380 Prosperity Farms Road
Suite 204
Palm Beach Gdns, FL 33410
(561) 622-8100

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JANUARY 27, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4140

D. C. Docket No. 93-8322-CV-KLR

BARBARA PARRISH, DENNIS WETZEL,
ROBERT LUCAS,

Plaintiffs-Appellants,

versus

GARY R. NIKOLITS, individually and in his official capacity as the Property Appraiser of Palm Beach County, Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 27, 1999)

Before TJOFLAT, BLACK and CARNES, Circuit Judges.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

---

1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED DECEMBER 31, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8322-CIV-RYSKAMP

BARBARA PARRISH, DENNIS WETZEL, and ROBERT LUCAS,

Plaintiffs,

vs.

GARY NIKOLITS, in his official capacity as the Property Appraiser of Palm Beach, County, Florida,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon defendant's Motion for Summary Judgment **[DE 117]**, filed September 30, 1997. Plaintiffs responded, defendant replied, and the Court held a hearing on the motion on November 13, 1997. The Court considers the motion ripe for adjudication.

Appendix B

I. BACKGROUND

Plaintiffs commenced the above-styled cause seeking declaratory, injunctive, and monetary relief pursuant to 42 U.S.C. § 1988 to redress alleged constitutional violations stemming from their alleged discharge without cause from employment with the Palm Beach County Property Appraiser's Office. The gravamen of the plaintiffs' Complaint is that defendant fired several employees of the County Appraiser's Office allegedly because of plaintiffs' political patronage of other candidates during the 1992 primary and general elections. Plaintiffs further charge that they were terminated to make room for defendant's political supporters and financial contributors.

During the 1992 campaign for Property Appraiser in Palm Beach County, though none were Democrats, each of the plaintiffs allege that they supported Democratic candidates, and were terminated by the victorious Republican candidate. The record demonstrates that plaintiff Barbara Parrish, the former Director of Human Resources in the Property Appraiser's Office, actively supported John Beaupre in the Democratic primary campaign. Ms. Parrish solicited funds, handed out campaign literature, attended and brought guests to a campaign barbeque, and sponsored a "meet the candidate" reception at her home for Mr. Beaupre. 1st Parrish Depo. at 138-147. However, Mr. Beaupre lost in a primary run-off with Democratic candidate Agnes Feak. At that point, Ms. Parrish alleges that she transferred her allegiance to Ms. Feak. Complaint ¶ 21. However, she concedes that she did not actively support Ms. Feak in the campaign against the defendant. 1st Parrish Depo. at 123-24.

Appendix B

Plaintiff Dennis Wetzel, the former Director of Information Technologies in the Palm Beach County Property Appraiser's Office, also actively supported Mr. Beaupre in the Democratic primary. Mr. Wetzel distributed campaign literature and solicited campaign contributions on Mr. Beaupre's behalf, and sponsored a "meet the candidate" reception at the Parrish's home. 1st Wetzel Depo. 106-07; 2nd Wetzel Depo. at 137-39, 141-52. Once Mr. Beaupre was defeated in the Democratic primary, Mr. Wetzel claims that he transferred his allegiance to Ms. Feak in her campaign against the plaintiff. Complaint ¶ 44. However, Wetzel admits to not actively supporting the Feak campaign. 1st Wetzel Depo. at 109-10; 2nd Wetzel Depo. at 136, 152-53.

Plaintiff Robert Lucas, the former Manager of the Property Analysis Section at the Palm Beach County Appraiser's Office, claims that he supported Mr. Beaupre by contributing $24 and soliciting contributions from 5-10 people. 1st Lucas Depo. at 26-28. Upon Mr. Beaupre's defeat in the Democratic primary, Mr. Lucas also claims that he transferred his allegiance to Ms. Feak. Complaint ¶ 62. However, Mr. Lucas admits that he did not "actively" support neither Mr. Beaupre or Ms. Feak, but was himself running for county office in Martin County, Florida. 1st Lucas Depo. at 26-28.

Defendant Gary Nikolits, the Republican candidate, defeated Ms. Feak and was elected as Property Appraiser in Palm Beach County. After defendant was elected and before he took over the position of Property Appraiser, he sent letters to eight employees, including the plaintiffs, notifying them that their services would no longer be needed because he

was bringing in a new senior management team. A short while later, plaintiff submitted the applications of eight individuals for employment with the Property Appraiser's Office. Answer ¶¶ 24, 47, 65. On January 5, 1993, defendant's first day in office, plaintiffs were terminated from their positions in the Property Appraiser's Office.

Plaintiffs initiated the present legal action on June 17, 1993, alleging that defendant terminated their employment for political patronage reasons, in violation of the First and Fourteenth Amendments. This Court has considered a summary judgment motion by defendant previously in this matter, entering judgment in favor of defendant individually and in his official capacity, on December 30, 1994. However, plaintiffs appealed, and the Eleventh Circuit vacated this judgment in part, and remanded the case for reconsideration of the claims against defendant in his official capacity. *Parrish v. Nikolits*, 86 F.3d 1088, 1095 (11th Cir.1996). In reversing, the Eleventh Circuit cited the Supreme Court's political patronage test in *Brand v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287(1980), and noted this Court's failure to demonstrate that party affiliation was an appropriate requirement for the Appraiser's Office jobs. In its instant summary judgment motion, and different from its prior motion, defendant argues that the plaintiffs were not fired for political patronage reasons, and therefore that the *Elrod-Branti* test does not apply. Defendant urges this Court to again enter summary judgment in his favor.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) sets forth the standard governing summary judgment. In its most basic

form, summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some evidence showing that material facts are in issue. *Anderson*, 477 U.S. at 256. "Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *See also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Eleventh Circuit has restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance with U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file,

> that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

III. DISCUSSION

A. The Law in Political Patronage Cases

A discussion of the applicable precedent is necessary to set in the proper context a review of this case. Government employers can neither coerce employees to compromise their beliefs nor place unconstitutional conditions upon public employment. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 684-685 (1967). The employee does not, however, receive blanket first amendment protection regardless of the governmental interest. A balance is struck between the employee's first amendment interest and the government's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1735. Not only must the means chosen be rationally related to furthering a paramount or vital governmental interest, but the means must also be closely drawn to avoid unnecessary abridgement of first amendment

freedoms. *Buckley v. Valeo*, 424 U.S. 1, 64-65, 96 S.Ct. 612, 656 (1976); *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734.

In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976), the Supreme Court held that patronage dismissals of public employees — that is, discharging employees on a partisan political basis — infringe first amendment interests. In *Elrod*, Republican sheriff's office employees were discharged or threatened with discharge after a Democratic sheriff assumed office, solely because they were not members of or supportive of the Democratic party. The Court held that the Constitution proscribes discharge of non-civil service employees solely because they did not support and were not members of the political party of the newly elected sheriff or because they had failed to obtain the sponsorship of the leaders of that party. *Id.* at 351, 96 S.Ct. at 2678-2679.

In *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980), the Supreme Court held that nonpolicymaking, nonconfidential assistant public defenders, appointed by a Republican public defender, could not be terminated by the newly appointed Democratic public defender solely on the ground of their political beliefs. The Court found that unless the government could demonstrate an overriding interest of vital importance requiring that a person's private beliefs conform to those of the hiring authority, his beliefs could not be the sole basis for depriving him of continued public employment. *Id.* at 515-16, 100 S.Ct. at 1293-1294. The burden rests upon the hiring authority to demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Id.* at 518, 100 S.Ct. at 1294-1295.

Appendix B

In the present case, defendant claims that the *Elrod-Branti* analysis is not applicable, because plaintiffs have failed to produce sufficient evidence that defendant terminated their employment for political patronage reasons. In *Tanner v. McCall*, 625 F.2d 1183 (5th Cir.1980), *cert. denied*, 451 U.S. 907, 101 S.Ct. 1975 (1981), the Fifth Circuit set forth a three-step inquiry to assess whether a plaintiff should prevail under the *Elrod-Branti* rationale.[1] That inquiry is as follows: (1) Assuming plaintiff's allegations are true, was the defendant's conduct an impermissible infringement of First Amendment freedoms? (2) Have plaintiffs met their burden of producing evidence of a constitutional violation? (3) Has defendant rebutted plaintiffs' showing by proving that the plaintiff would not have been retained in any event, for reasons apart from his constitutionally protected conduct. *Id.* at 1190.

B. Insufficient Evidence Demonstrating Defendant's Discriminatory Intent

It is the second prong of the *Tanner* test that this Court finds particularly relevant in the instant matter. In terminating the plaintiffs, defendant cited valid, permissible, and non-political reasons. Concerning the termination of Ms. Parrish, defendant claims that he lost trust and confidence in her as a result of her activities in connection with his termination from employment with the Property Appraiser years earlier. 1st Nikolits Depo., Vol. 2, at 118-21. As to Mr. Wetzel,

---

1. In *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as precedent all opinions of the Fifth Circuit rendered prior to October 1, 1981.

defendant claims that his position was a non-essential one since the County had taken over the data processing systems and other people in the office could handle whatever information technologies work was required to be done. *Id.* at 121. As to Mr. Lucas, defendant claims to have chosen another more suitable head (Mr. John Pontz) of the Commercial Appraisal Department, because defendant knew of Mr. Pontz work and had complete confidence and trust in him. Conversely, defendant did not have confidence and trust in Mr. Lucas because, when they worked together in the past Lucas had expressed dissatisfaction with the type of work the defendant did. *Id.* at 111, 121-24. Each of these reasons are valid, believable, non-political reasons for terminating the employment of the plaintiffs. In such instances, *Tanner* shifts the burden and requires plaintiffs to demonstrate sufficient evidence of impermissible political patronage discrimination. *Tanner*, 625 F.2d at 1192.

In *Tanner,* a suit was brought by five former deputies and a former secretary against the newly elected sheriff of Lake County, Florida. The court discussed both *Elrod* and *Branti* and noted that it was the plaintiffs' burden to prove that the defendants' intent to discriminate or violate the plaintiffs' constitutional rights was "a substantial motivating factor" in the employment decision: "When neutral decisional criteria are utilized by an employer, a plaintiff's case is more difficult to prove. . . ." *Id.* Loyalty and efficiency are among the criteria which an employer may use in order to decide whether to terminate or retain or appoint a particular employee. "If the first amendment motive is not the 'but for' reason for the refusal to reappoint plaintiffs, their section 1983 action fails. (Citations omitted)." *Id.* at 1195. "Plaintiffs

can avoid summary judgment by pointing to evidence in the record which, if credited, would permit a rational fact-finder to conclude that their conduct was constitutionally protected and that the protected conduct was a substantial factor in their dismissals." *Cutliffe v. Cochran*, 117 F.3d 1353, 1355 (11th Cir.1997). However, even if plaintiffs meet the substantial factor burden and the challenged action would be otherwise impermissible, if the employer can show that the action would have been taken even in the absence of the employee's protected conduct, the employer is entitled to prevail. *McCabe v. Sharret*, 12 F.3d 1558, 1565 n. 8 (11th Cir.1994); *e.g., Tanner*, 625 F.2d at 1195.

In writing for the court in *Tanner*, Judge Fay concluded that the facts did not support plaintiffs' contention that they were not appointed because of their non-support for defendant in the election, or because defendant desired to hire his own political supporters. *Tanner*, 625 F.2d at 1191. In concluding that the facts of *Tanner* did not support plaintiffs' contention, the court noted the following:

> 1. The defendant in *Tanner* knew that some of the employees he was retaining had actively supported his opponent.
>
> 2. Unlike *Elrod* or *Branti*, defendant did not effect a wholesale replacement of employees. Only about a quarter of the employees in *Tanner* were not retained. Also, defendant did not fire all supporters of his opponent.

> 3. The plaintiffs in *Tanner* cited no direct statements by defendant that political patronage motivated his appointments.
>
> 4. The defendant in *Tanner* was familiar with the abilities of the replacement employees by virtue of working with them in the past, and on that basis appointed them to fill plaintiffs' positions.

Id. at 1191-1192.

In the instant case, the facts compel this Court's determination that defendant did not terminate plaintiffs' employment for political patronage reasons. The record is replete with evidence that political patronage was not defendant's reason for terminating the plaintiffs' employment. First, none of the plaintiffs actively supported an actual opponent of the defendant. It is Ms. Feak, and not Mr. Beaupre, that ran unsuccessfully against Mr. Nikolits. Plaintiffs' Statement of Disputed and Undisputed Facts in Opposition to Defendant's First Motion for Summary Judgment, at 4. Neither Mr. Nikolits nor Ms. Feak knew that the plaintiffs' supported the Feak campaign. 1st Nikolits Depo., Vol. II at 194; Affidavit of Agnes Feak ¶¶ 10-14, 20. Instead, plaintiffs' active support was for Ms. Feak's Democratic primary opponent, Mr. Beaupre, who never ran against the defendant in any election. None of the plaintiffs ever cast a vote for Beaupre, as none were Democrats. In the case of Mr. Lucas, he did not vote for Ms. Feak in the final election, as he resided out of the district. 2nd Lucas Depo. at 69. There is no evidence that defendant knew of the plaintiffs allegiance to his election opponent Ms. Feak, but only knew

of their support for the Beaupre Democratic primary campaign. 1st Nikolits Depo., Vol. II at 194. This Court finds plaintiffs' arguments especially tenuous, because the plaintiffs allege active support only for Mr. Beaupre, against whom the defendant never was pitted.

Second, defendant did not effect a wholesale replacement of employees based on their non-support for his campaign. Of the 228 employees in the Property Appraiser's Office, only eight were not retained. 1st Parrish Depo. at 126. This calculates to some 96.5 % of employees who were retained. Certainly, defendant had more than eight supporters who could have been 'rewarded' with jobs. Relatedly, defendant did not fire all supporters of the Democratic primary candidate, Mr. Beaupre. Defendant retained 98 employees, or over 97%, of all employees who contributed financially to the campaign of Mr. Beaupre. Affidavit of Gary Nikolits at ¶¶ 8-9. From reviewing Beaupre's campaign reports, defendant knew that almost half of the office had contributed to Mr. Beaupre's campaign. *Id.* Also, two of the eight terminated employees did not contribute to the Beaupre campaign, and one of the eight terminated employees was one of defendant's own supporters, a contributor, and an attendee at Nikolits campaign fundraisers. 1st Nikolits Depo. at 127. The record on these important points does not support plaintiffs contention that defendant fired them for political patronage reasons.

Third, plaintiffs do not cite any direct statement by defendant that political patronage motivated his appointments, or that he decided not to retain plaintiffs for their support for other candidates. Though defendant

concedes that he inquired of Ms. Parrish's husband about why she did not support him, he did not state that Ms. Parrish would lose her job because of her active political support for Mr. Beaupre. Plaintiffs also urge this Court to infer political motivation from a thoroughly reasonable statement of the defendant regarding his philosophy of new appointments. Defendant stated that he wanted individuals in the positions whom he could "have trust in, confidence in and that will carry out my philosophy and my policies as was mandated by the voters." 1st Nikolits Depo., Vol. II, at 127, 168-69. In this statement, the defendant does not claim to be ousting plaintiffs because of their political support for another, but because of his lack of confidence in them to accomplish the job. Defendant desired to retain a management team that would believe and act consistent with his property appraisal philosophy. Motion for Summary Judgment at 3-4. A fourth and final point is highly relevant to this discussion. Defendant was familiar with the abilities of six of the eight appointments he made, by virtue of working with them in the past, and had personal knowledge of the plaintiffs' work due to his prior work stint in the Property Appraiser's Office. So, defendant could speak knowingly and competently to the quality of their relative performances and property appraisal philosophies. Also, the record demonstrates that he hired the incoming group in spite of their party affiliations. Two of the eight hired were not Republicans, and one did not contribute to defendant's campaign. Again, these facts cut against plaintiffs' political discrimination theory. Indeed, if the court were to accept the plaintiffs' claims based upon the evidence in this case, it would send a signal to all public employees to support all candidates who run for the top position, so that no matter

who got elected, they could not be discharged from their position.

These factors compel this Court to issue summary judgment for defendant in this action. Plainly, under the reasoning of *Tanner*, the evidence in this case is insufficient to create a question of material fact which would warrant presentation of plaintiffs' political patronage allegations to a jury. Plaintiff claims that it would be inappropriate for this Court to make final "state of mind" findings as to the defendant's intent in terminating the plaintiffs, arguing that such findings must be left to a jury. However, *Tanner* makes clear that plaintiffs must produce sufficient evidence that would support a discriminatory state of mind finding. Plaintiffs have failed to make this showing. Accordingly, summary judgment will be entered for the defendant.

IV. CONCLUSION

The Court has considered the motion and the pertinent portions of the record and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that defendant's Motion for Summary Judgment **[DE 117]** be, and the same is hereby **GRANTED**. Final Summary Judgment shall be entered by separate order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 31 day of December, 1997.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED DECEMBER 31, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8322-CIV-RYSKAMP

BARBARA PARRISH, DENNIS WETZEL, and ROBERT LUCAS,

Plaintiffs,

vs.

GARY NIKOLITS, in his official capacity as the Property Appraiser of Palm Beach, County, Florida,

Defendant.

FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court upon defendant's Motion for Summary Judgment **[DE 117]**, filed September 30, 1997. By separate Order, the Court indicated that defendants' motion would be granted. Wherefore, it is

ORDERED AND ADJUDGED that Final Summary Judgment is hereby entered for defendants and against plaintiffs as to all counts. The Court hereby reserves jurisdiction to tax fees and costs. The Clerk of the Court

shall **CLOSE** this case and **DENY** all pending motions as moot.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 31 day of December, 1997.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 29, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-4140

BARBARA PARRISH, DENNIS WETZEL, ROBERT LUCAS,

Plaintiffs-Appellants,

versus

GARY R. NIKOLITS, individually and in his official capacity as the Property Appraiser of Palm Beach County, Florida,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT, BLACK and CARNES, Circuit Judges.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE